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MINUTES
FRIDAY – APRIL 11, 2003

Call to Order

The Board of Environmental Review's teleconference meeting was called to order by Chairman Russell at 10:34 a.m., on Friday, April 11, 2003, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present (via telephone): Chairman Joseph Russell, Ward Shanahan, Dr. Garon Smith, David Fishbaugh, Kim Lacey, Susan Brooke, and Russ Hudson

Board Members Absent: None

Board Attorneys Present: Tom Bowe, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Carol Hendrickson, Hendrickson's Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Lisa Peterson, Public Affairs Coordinator, Director's Office (DIR); John North, Chief Legal Counsel, Legal Unit (Legal), DIR; Claudia Massman, Legal, DIR; Elois Johnson, Legal, DIR; Bonnie Lovelace, Chief, Water Protection Bureau (WPB), Permitting and Compliance Division (PCD); Art Compton, Administrator, Planning, Prevention and Assistance Division (PPAD); Abe Horpestad, Resource Protection Bureau (RPB), PPAD; Christian Levine, RPB, PPAD

Interested Persons Present: Alan Joscelyn; Jeff Barber; Veronica Small-Eastman; and Harmon Ranney

Interested Persons Present via Telephone: Michael Reisner; Dave Searle; Rex Mongold; Joe Zonto; and Dave Schwartz

Agenda

I. Action Agenda Items

A. Continuation of March 28, 2003, Agenda Item III.A.2

1. In the matter of numeric water quality standards.

Mr. Livers informed the Board that representatives from industry and the media were present in the conference room, as were some legislative representatives.

Chairman Russell explained that the purpose of the teleconference was to discuss some of the issues that remained from the March meeting and that there may be some changes made to the standards that were noticed due to a decision of the 9th Circuit Court.

The first order of business involved corrections to the notice that was sent to the Board on April 4. Mr. North said there were five responses to comments that the Department was proposing to correct, the first of which was comment No. 27. He said the Department would propose to strike the existing response and replace it with the following:

“The Board agrees that establishing an EC standard of 1500 during the non-irrigation season may be appropriate in order to protect young fish in the Tongue River and Rosebud Creek during that season. However, since the ambient level of EC in Rosebud Creek often exceeds 1500 during the non-irrigation season, the Board does not believe that setting a standard at 1500 for Rosebud Creek is appropriate. For this reason, the Board is establishing a non-irrigation standard for EC at 1500 for the Tongue River, but retaining the originally proposed non-irrigation standard of 2000 EC for Rosebud Creek.”

Dr. Smith MOVED to ACCEPT the revised response for comment No. 27. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 8:13).

Mr. North said the next comment response to be revised was comment No. 30, in the sixth sentence beginning, “Any SAR above 5.0 poses a significant risk,” the Department was proposing to eliminate the word “significant.”

Mr. Hudson said he would like “significant” to remain in the response. Dr. Smith commented that the word “risk” conveys that there is a problem. Mr. Fishbaugh and Ms. Brooke expressed interest in removing “significant,” agreeing with Dr. Smith’s comment.

Ms. Brooke MOVED to ACCEPT the revision to the response for comment No. 30. Mr. Shanahan SECONDED the motion. The motion CARRIED with a 6-1 VOTE (ref. 10:24).

The next response addressed was to comment No. 32. Mr. North explained that the Department was proposing to add “during the irrigation season” to the end of the second sentence.

Ms. Brooke MOVED to ACCEPT the revision to the response for comment No. 32. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 11:20).

The last response to be addressed was comment No. 51. Mr. North said the Department was proposing to add the following sentence to the end of the response:

“Likewise, it supports the desire of the Board to be conservative in the adoption of a non-irrigation season EC standard of 1500 for the Tongue River.”

Ms. Brooke MOVED to ACCEPT the revision to the response for comment No. 51. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 13:18).

Chairman Russell explained that the next issue was to reconsider the SAR on the Powder River, citing consistency issues. Discussion took place regarding the number that was chosen by the Board, the number recommended by the Department and the mean value.

Mr. Shanahan MOVED to reconsider the SAR standard for the Powder River during the irrigation season, changing it from 4 to 5. Ms. Brooke SECONDED the motion.

Dr. Smith questioned whether this was within the scope of the notice for this meeting and said he did not agree to this teleconference with the intent of reconsidering any of the numbers chosen at the March 28 meeting. He was also concerned that this was not good public process.

Mr. Bowe stated that it was indeed within the scope of the notice and proceeded to read the notice aloud. Discussion continued and Mr. Hudson suggested passing what was voted on previously and initiating new rulemaking to consider the changes. Also discussed were EPA's and Wyoming's involvement in the process.

The motion CARRIED with a 4-3 VOTE (ref. 30:24).

Chairman Russell explained that the next issue would be setting a maximum, which would be 150% of the monthly average or 7.5. Mr. Fishbaugh MOVED to change the maximum SAR standard to 7.5 for the Powder River during the irrigation season. Ms. Brooke SECONDED the motion. The motion CARRIED with a 4-3 VOTE (ref. 32:2).

Mr. Fishbaugh MOVED to ADOPT a 6.5 SAR monthly average and a maximum SAR of 9.75 for the Powder River during the non-irrigation season. Ms. Brooke SECONDED the motion. The motion CARRIED with a 4-3 VOTE (ref. 34:23).

Mr. North explained that some of the responses to comment would need to be changed. He said the response to comment No. 2 would need to be changed from "6" to "6.5" in the second to the last sentence.

Mr. North said the response to comment No. 5 would also require revision. In this response, the first sentence would remain the same, but the second sentence would be changed to: "According to analyses performed by DEQ staff, the revised rules would allow for at least several thousand acre feet of CBM discharges to the Powder River without violating standards, even after the nondegradation threshold for flow is applied (i.e. 15% of the mean monthly flow). For the Tongue River, there could be from 10,000 to 15,000 acre feet of CBM discharges."

Mr. North explained that in response to comment No. 30, the fifth sentence would be revised to replace "4.0" so the sentence reads, "The average monthly SAR standard of 5.0 for the Powder River and the Little Powder River will limit the harmful effect of rain on assimilative capacity." He said the response to comment No. 37 should be revised in the third sentence to read, "The standards that are being adopted for the irrigation season are 2000 µS/cm and 5, respectively."

Ms. Lacey MOVED to ADOPT the above changes to the response to comment No.'s 2, 5, 30, and 37. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 38:17).

Mr. Hudson MOVED to ADOPT an EC standard of 1500 for Rosebud Creek during the non-irrigation season. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 39:25).

Mr. North explained that the response to comment No. 27 would need to be changed again, striking the previously adopted language and reading, "The Board agrees. The Board concludes that the non-irrigation season standard for EC at 1500 for the Tongue River and Rosebud Creek will not be harmful to fish or other aquatic life."

Mr. Shanahan MOVED to ADOPT the change to the response to comment No. 27. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 41:11).

Mr. North said the response to comment No. 45 would also need to be revised. He said the Board would need to add a sentence at the end of the first paragraph that said, "The Board has also modified the non-irrigation season standard for EC on the Tongue River and Rosebud Creek."

Mr. Shanahan MOVED to ADOPT the change to the response to comment No. 45. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 42:3).

Mr. North said the response to comment No. 51 would need to be revised further by simply adding "and Rosebud Creek" to the last sentence.

Ms. Lacey MOVED to ADOPT the change to the response to comment No. 51. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 42:24).

Mr. North explained that the Ninth Circuit Court of Appeals in San Francisco had overturned the Haddon decision and ruled that a coalbed methane producer is required to obtain a discharge permit, under the Federal Clean Water Act, to discharge coalbed methane waters. He said because the Department had only had about 24 hours to deal with the meaning of this, the Department was recommending that the Board defer consideration on the adoption of the significance determination until the June meeting.

Mr. Bowe concurred with Mr. North, and advised the Board to defer consideration of the significance determination.

Ms. Brooke MOVED to remove the amendments to ARM 17.30.706, to strike the language in part 2 of the notice, and to remove comment No.'s 46 and 47 and the responses to them and any other comments and responses that are found pertaining to the significance determination. Mr. Shanahan SECONDED the motion. Mr. Hudson expressed concern about the Board making hasty decisions and having to come back later to correct them. The motion CARRIED with a unanimous VOTE (ref. 52:8).

Mr. North explained that the basis for the Court's decision was that coalbed methane water contains waste, and therefore a permit is required. He said that New Rule II sets up a classification for coalbed methane ponds and that Rule III sets standards for those ponds. Mr. North said the definition of state waters excludes ponds that impound wastewater or waste and that the Board only has authority to classify and set standards for state waters. Mr. North concluded New Rules II and III may not be appropriate and recommended the Board postpone

decision on the adoption of New Rules II and III until the June meeting. He also requested authority for the Department to remove the comments and response related to New Rules II and III, which included No.'s 14, 15, and 16.

Ms. Lacey MOVED to postpone action on New Rules II and III and to REMOVE comments and responses 14, 15, 16 and any others that pertain to New Rules II or III. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE (ref. 55:24).

Brief discussion confirmed that the 521 and 311 analyses were still valid. Chairman Russell called for a motion to ADOPT the 521 and 311 analyses and Rule IV, as amended by votes this day and on March 31, and to AMEND ARM 17.30.602, as proposed, and to ADOPT the responses to comments contained in the April 4 packet, with the amendments and deletions made this day.

Mr. Bowe clarified the language to be contained in the second paragraph of the Notice of Adoption: "The Board did not adopt New Rule I or the proposed amendments of ARM 17.30.715 from MAR Notice No. 17.171 of Alternative I of New Rule IV from MAR Notice No. 17-187. The Board deferred consideration of New Rules II and III and the proposed amendment of ARM 17.30.706 until it's June 6, 2003 regularly scheduled meeting. The Board has adopted Alternative II of New Rule IV (17.30.670) and amended ARM 17.30.602 as proposed, but with the following changes from the amended notice, stricken matter interline, new matter underlined."

Mr. Shanahan so MOVED. Dr. Smith SECONDED the motion and provided two proofreading clean-ups. The motion CARRIED with a unanimous VOTE.

II. ADJOURNMENT

Chairman Russell called for a motion to ADJOURN. Ms. Brooke so MOVED. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously. The meeting adjourned at 11:03 a.m.

Board of Environmental Review April 11, 2003 Minutes Approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE